

Open (in)justice: privacy, open justice and human rights

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Abstract

The principle that court hearings must be open to the public is regarded as sacrosanct. It has recently been invoked by the Court of Appeal in *MN v OP* as the reason for refusing an application to anonymise the approval of an arrangement under the Variation of Trusts Act 1958 Act. Yet, the reasons generally given for insisting on open justice as a matter of principle are unconvincing when applied to civil cases as opposed to criminal cases or those, such as judicial review, in which the power of the state is pitted against the individual citizen. If private citizens are free to resolve their disputes privately through arbitration or mediation, why should they not be allowed to have their cases heard by the court in chambers unless there is some special feature of the case requiring publicity? Why are anonymised judgments not sufficient to ensure that justice is administered fairly and in accordance with the law? Could not more use be made of reporting restrictions? In this article, it is argued that the courts should do more to protect the privacy of litigants, and should not bow to populist demands to pry into the affairs of others (particularly the very wealthy). If they do not, those who can afford to do so will choose arbitration, or litigate in off-shore jurisdictions that are more sympathetic to their reasonable desire for privacy.

I am of opinion that every Court of justice is open to every subject of the King. (Viscount Haldane LC.)

The inveterate rule is that justice shall be administered

in open Court. (Earl Loreburn)

... all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts. (Lord Bingham of Cornhill)

The idea of a court hearing evidence or argument in private is contrary to the principle of open justice, which is fundamental to the dispensation of justice in a modern democratic society. (Lord Neuberger of Abbotsbury)

1. The importance of the principle that court hearings should be held in open court has been stated and restated at the highest judicial level so often and so emphatically that it seems impertinent even to think about questioning it. In *Scott v Scott*, Lord Shaw of Dunfermline invoked Jeremy Bentham: “Where there is no publicity there is no justice . . . Publicity is the very soul of justice.” Indeed, Counsel in *Scott v Scott*—the leading modern authority on the topic—characterised the principle as an “axiom of English law”.¹

2. The problem with axioms is they are literally beyond question: self-evident, and therefore necessary to accept before any discussion can even begin. But is it really self-evident that justice requires court hearings (subject to a few narrow exceptions) to be conducted in public? Why? Is it not conceivable that Bentham’s orotund declarations mask some rather woolly thinking?

3. Let me make it clear at the outset that I am only discussing civil law, not criminal law. In cases

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1. p. 429.

involving disputes between the state and the private individual, the state would have an uncontrolled advantage if it could act in secret: anything resembling a Star Chamber would be obviously open to abuse, and tyranny would quickly follow. The same argument may apply to judicial review, where again there is an imbalance of power between the state and the citizen.

4. However, Jeremy Bentham explicitly stated that the principle that he was advocating applied to civil justice just as much as to criminal justice. In Bentham's *Draught for the Organisation of Judicial Establishments*,² he wrote—

And is it then only in *criminal* matters that the proceedings previous to judgment are to be public according to their plan? And is it only the ceremony of pronouncing judgment that is to be public in such cases as are termed *civil*? But on what possible ground admit publicity in the one case, and reject it in the other? Do the terms *civil* and *criminal* indicate any fixed line of separation between the classes they are meant to distinguish? – do they indicate so much as the comparative importance of the cases thus classed? May not four or five livres be the stake in a criminal cause, while four or five millions, or liberty, is at stake in a civil one? [Emphasis as in the original.]

5. This is just grandiose bluster. The issue is not the amount of money at stake, but whether or not the power of the state is being exercised against the citizen. The arguments that apply to criminal proceedings (or their equivalent) simply do not apply to private disputes between private individuals, in which the state has no interest of its own in the outcome. The liberty of the individual is not at stake.³

6. Even where the state does have an indirect interest—such as the tax consequences of a variation of

trust—the protection of the citizen from abuses of power by the state only requires that the *state* should not be able to insist on private hearings: it should not impose upon the citizen an obligation to subject his private tax returns to the public gaze as the price of invoking the law.⁴

7. Furthermore, in most ordinary private disputes, the parties have the alternative choice of resolving their disputes privately through mediation or arbitration. (There are, of course, a number of well-recognised situations in which an arbitrator would not have the necessary powers: an arbitrator could not, for example, grant a decree of divorce or issue a grant of probate. I will return to the issue of arbitrability later.) But if private disputes can be resolved privately through arbitration—applying the same rules of law—without engaging the public interest, why is the same not true of a private decision from the court?⁵

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The judge as arbitrator

8. One of the interesting features of *Scott v Scott* is that there existed at the time a practice, whereby the parties could invite the judge to sit as an arbitrator. As Viscount Haldane LC explained—

In cases in other Courts,⁶ where all that is at stake is the individual rights of the parties, which they are free to waive, a judge can exclude the public if he demits his capacity as a judge and sits as an arbitrator.⁷

2. Chapter 1, p. 317.

3. Things may have been different when one could be imprisoned for debt.

4. It is occasionally argued that those who use the courts should accept publicity because it is a public service provided at public expense. But no-one suggests that anyone who uses the NHS should allow their medical records to be made public.

5. As a matter of logic, it could be argued that the mischief is in the private nature of arbitration, and that the interest of the public in open justice requires a ban on arbitrations. However, that is surely too uncommercial and impractical a position to be advanced as a real-world solution.

6. That is to say, other than the Ecclesiastical Courts, which he had been discussing in the previous paragraph.

7. At 436.

9. This is remarkable. The report of *Scott v Scott* in fact cites one example in which this actually happened in rather dramatic circumstances: *Malan v Young*.⁸ This was a claim for damages for libel and slander uttered by the Headmaster of Sherborne School against an assistant master. The parties requested the judge to hear the case in private, and a question arose as to whether he had jurisdiction to do so. The judge said he wanted to consult with some of the other judges, and, having consulted, he returned to court and said he had decided he could try the case *in camera* without a jury. The report continues—

The Court was then ordered to be cleared.

A barrister robed objected to leave the Court.

Mr Justice Denman. – On what grounds?

The Barrister. – As a member of the public and the father of sons at school.

Mr Justice Denman. – Have you anything to do with this case?

The Barrister. – No.

Mr Justice Denman. – Then I must order you to leave the Court, Mr Gould.

Mr Gould. – I protest, my Lord.

Mr Justice Denman. – I hear your protest and I order you to leave the Court, or I must get the ushers to remove you.

Mr Gould then retired, and the hearing of the case proceeded *in camera*.

10. However, that was not the end of the matter. The story is taken up by Lord Shaw of Dunfermline later in *Scott v Scott*⁹—

But the case had a sequel which is described in the judgment of Vaughan Williams L.J., who ratifies his authority and on his own knowledge and recollection the following account in the Annual Practice of 1912: – “The following subsequent occurrence is, however, unreported: – The trial proceeded in

camera on 11th, 12th and 13th November, 1889, and was adjourned to 15th January, 1890, when the judge stated that, in view of the fact that there was considerable doubt among the judges as to the power to hear cases in camera, even by consent, he would ask the parties to elect to take the risk of going on with the case before him in camera, or begin it *de novo* in public. The parties elected to go on with the case before the judge as arbitrator, and to accept his decision as final, subject to the condition that judgment should be given in public,¹⁰ which was done (extracted from the Associate’s recorded note of the case).”

11. From its treatment of *Malan v Young*, it appears that the House of Lords considered that there was nothing objectionable, constitutionally or jurisprudentially, in the same case being heard in a private arbitration by the same judge, sitting in the same court, and applying the same laws. The parties forego their right of appeal, but it is hard to see why that makes a difference to the principle.

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12. In *Malan v Young*, the possibility of a judgment being handed down in an anonymised form would not have been an option, as the purpose of a libel action is to vindicate the public reputation of the plaintiff. However, there is no reason why the judgment in *Scott v Scott* could not have been given anonymously, but that option was not considered. Yet, as I argue further below, many of the objections to private hearings disappear if anonymised judgments are delivered in a form that can be reported without disclosing the identity of the parties.

8. (1889) 6 Times LR 38. Another example of this procedure may be found in *In the Matter of Lord Portsmouth* (1815) G. Coop. 107.

9. At 480–481.

10. The report does not explain whether this was a condition imposed by the court or insisted on by the parties themselves.

Why are public hearings said to be necessary?

13. Once it is conceded that in civil cases between private citizens a private arbitration does not entail the violation of any fundamental principle of justice, it becomes necessary to explain, as Bentham did not, exactly *what* the public interest is in knowing the details of other people's private disputes. This is what Lord Woolf MR sought to do in *R v Legal Aid Board ex parte Kaim Todner (A firm)*¹¹—

... it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witness' identities concealed. It makes uninformed and inaccurate comment about the proceedings less likely ... Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it.

I will take each of these arguments in turn.

Deterrence of inappropriate behaviour by the court

14. If there were a genuine risk of the court behaving improperly, this would indeed be a compelling argument. However, there are several objections to it.

15. First, the fact that the court hears a case in private does not prevent either party from making the result, and the details, public. That was, indeed, part of the *ratio* of *Scott v Scott*, which held that it was not a contempt of court by the petitioner in the

divorce to obtain and distribute a transcript of the proceedings that had been held in camera.

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16. More recently, in *Hodgson v Imperial Tobacco Ltd*,¹² Lord Woolf drew a distinction between hearings "in chambers" and hearings "in camera", and explained that although hearings "in chambers" were in private, this did not prevent the parties from making them public. Section 12 of the Administration of Justice Act 1960 confirms that "the publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court" except in a limited number of specified situations. Furthermore, the court has power under Section 12(2) to make an order expressly prohibiting publication. In contrast, hearings in camera were properly described as "secret", as the court had decided that the administration of justice would be rendered impracticable if the public were aware of what had taken place.

17. Thus, if either party, having initially agreed to have the case heard in private, considers that justice was not done, he or she is at liberty to go to the press, or to protest online. There is ample scope for the court's conduct to be subjected to scrutiny. The objection that by then it is too late applies equally if the court fails to deliver justice at a public hearing. The availability of an appeal does not depend on the proceedings being public.

18. Secondly, if there is a risk that the court might behave improperly, why is there not an equal risk in the case of arbitrations? Indeed, the risk in arbitrations is surely even greater, because if the parties choose to arbitrate they are *not* free afterwards to disclose what happened: they are bound by an

11. [1999] QB 966, cited with approval by Lord Steyn in *In Re S (A Child) (Identification: Restrictions of Publication)* [2005] 1 AC 593.

12. [1998] 1 WLR 1056.

implied obligation not to do so, nor can they make use of any material generated in the course of the arbitration. See *Ali Shipping Corp v Shipyard Trogir*.¹³

19. Thirdly, if the hearing takes place in private but the judgment is given in open court in anonymised form, the possibility of improper or inappropriate conduct by the court is eliminated. The public at large has no need to know the identities of the parties (or the witnesses) in order to be satisfied that the hearing was fair and that the decision was given in accordance with the law.

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20. Lord Woolf's assertion that public hearings are "necessary" to prevent improper conduct by the court is therefore an overstatement. A more accurate statement would be that public hearings are one way, but not the only way, of encouraging the courts to act properly; and they do not guarantee the result.

Public confidence

21. Public confidence that justice is being administered impartially is indisputably important. Historically, the adoption of open courts may have been based, at least in part, on the courts' own interest in establishing and protecting their independence from the executive. But Lord Woolf does not explain why public confidence depends on knowing the *identities* of the parties, rather than simply the substance

of, and reasons for, the decision. Moore Bick LJ made the same point in *X v Dartford and Gravesham NHS Trust*,¹⁴ when he said, "The identities of the parties are an integral part of civil proceedings and the principle of open justice requires that they be available to anyone who may wish to attend the proceedings or who wishes to provide or receive a report of them." Again, no reason is given for this assertion, other than the fact that that is how the rule has been applied (at least, in England and Wales¹⁵).

22. I would argue, however, that it is in fact easier for a disinterested observer to evaluate the fairness of a decision if he does *not* know who the parties are. It reduces the risk of being influenced by one's prejudices.¹⁶ Suppose, for example, one were to read a judgment in anonymised form, and decide that it was entirely fair; and suppose that one is told afterwards that the successful party was someone towards whom one feels a strong antipathy (or sympathy): might that affect one's opinion of the fairness of the judgment? If so, what would that tell us about the original decision? Or, to take a specific example, consider the decision of the Supreme Court to uphold a European Arrest Warrant: does it help, or hinder, one's ability to evaluate objectively the Supreme Court's reasoning to know that the appellant was Julian Assange?¹⁷ Would someone predisposed in Mr Assange's favour be more or less likely to be persuaded by the Court's reasons if they knew that he was the subject of the arrest warrant in question?

23. The argument that the fairness of a court decision cannot be properly evaluated by the public without knowing the identities of the participants seems to me plainly fallacious. *Scott v Scott* was a case in which the wife sought a declaration that the marriage was void on account of her husband's impotence.

13. [1999] 1 WLR 314.

14. [2015] 1 WLR 3647, ¶17.

15. Other systems of law are more protective of the identities of the parties.

16. Compare Rawls' "Veil of Ignorance" thought experiment in *Theory of Justice* (1971).

17. [2012] 2 AC 471.

How does the public's ability to decide whether justice in that case was administered impartially depend on knowing that the wife's name was Annie Maria Scott (aka Morgan), and that of the husband, Kenneth MacKenzie Scott?¹⁸ Conversely, if it is a fundamental principle that the public *does* need to know the identities of the parties, how is that reconcilable with the Family Procedure Rules 2010, which now provide that proceedings to which they apply are to be held in private unless the court directs otherwise?¹⁹

24. Of course, there may be particular cases in which the identity of a party may be of legitimate public interest in the context of a civil dispute. For example, the public would have a legitimate interest in knowing that a politician who campaigns publicly for stricter planning laws is locked in a dispute with his neighbour about building an underground swimming pool; or that a pop star who sanctimoniously lectures the public about its moral duty to pay taxes is busily exploiting loopholes. But that is because they have put themselves in the public eye in relation to that specific issue, and there is a blatant inconsistency between what they are doing and what they preach. The mere fact that they are famous should not be enough; nor should the mere fact that they are wealthy. The courts should distinguish between genuine public interest and mere prurience or envy.

Availability of evidence that would otherwise be unknown

25. Inevitably, a hearing in public will put matters in the public domain that would otherwise have remained private. It is not clear to me why this is desirable, rather than simply being an invasion of the privacy of the participants or, worse, their witnesses (who may have had no choice as to whether to give evidence).

26. It has, moreover, become a standard feature of litigation for the parties to be *required* to consider the

option of going to mediation—one of whose principal benefits is that it enables the dispute to be resolved privately and confidentially. Is it not fundamentally inconsistent of the courts to insist that justice can only be done if it is exposed to the public gaze, while at the same time encouraging litigants to take advantage of being able to maintain the veil of privacy by putting their disputes before a mediator rather than a judge?

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27. Nor should it be overlooked that, if confidentiality is of sufficient importance to a would-be claimant, he may, in an extreme case, prefer to suffer an actionable wrong rather than allowing his personal life to be exposed. This too represents a denial of justice. Either way, information about his life and business dealings would remain confidential.

Uninformed and inaccurate comment

28. This is the least persuasive of all the arguments that is advanced against hearing civil cases in private. Anyone who has had any experience of litigation knows that the reports that appear in the press are often barely recognisable. The comments of the general public that appear online following the newspaper reports are even further removed from reality. If the hearings were in private, it would at least be self-evident that anything purporting to report what took place was a figment of the writer's imagination; the misleading illusion of accuracy is worse than no report at all.

18. The reason the wife sought to go behind the privacy of the decision was that the husband had (or so she believed) given an inaccurate account of what had happened to members of his family. Curiously, the husband's full name is only mentioned in the House of Lords by Lord Shaw of Dunfermline.

19. Rule 27.10.

Counterarguments

29. Having considered the reasons most commonly advanced in support of the assertion that the judicial system would be at risk if the courts were to allow litigants to have their civil disputes heard in private, I would now like to draw attention to a number of considerations that militate *in favour* of private hearings if that is what the parties wish. I leave aside cases in which the court might decide that there was a positive reason why the case should be open to the public—such as the example of the hypocritical politician given earlier. I also assume that the norm would be for the judgment to be given or handed down in public and reported in the usual way, albeit in an anonymised form.

30. The world has changed since *Scott v Scott*. What appeared in the newspapers in those days would be quickly forgotten, and it would require diligent research to find the details of a report only a few weeks later. Nowadays, the record is permanent; and everything is accessible in a matter of seconds by anyone in the world. In addition, there is a far greater likelihood that someone in the public eye will be recognised in the street. The impact of publicity on any individual's private life is incomparably greater than it would have been in 1913.

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31. This point was vividly made by Beverley McLachlin PC, the Chief Justice of Canada, in her Annual International Rule of Law Lecture in 2014.²⁰ Addressing the tension between public justice and the individual's right to privacy, she said—

In Bentham's day, technical barriers to the mass collection and distribution of information offered some protection to the privacy of participants in the justice system. Only those who were able to attend the court

or read newspapers followed court proceedings. Today, television, the internet, and social media provide for the immediate dissemination of information to a vast audience. In the era of 21st century technology, the open court principle can mean an enormous loss of privacy. In short, the paradigm shift in communication that we are living through has necessitated a change in how we apply the open court principle.

32. To this, may be added the relatively recent practice in the Supreme Court of broadcasting its hearings live on the internet (with an instantly available archive of past hearings). I suspect it is only a matter of time (or money) before this practice is extended to hearings in the lower courts. The arrival of these technologies has fundamentally altered the impact on the parties of a trial being conducted in public from the days when "the public" was physically limited by the number of people who could fit into the courtroom. Even the imposition of reporting restrictions may be rendered ineffective if a member of the public can tweet about the proceedings from anywhere in the world.

33. In these circumstances, there is nothing suspicious or reprehensible about an individual's wish to have his or her case heard in private. Conversely, if one of the parties does *not* want the hearing to be private, it is entirely proper that the court should require special circumstances to justify making an order under Section 12 of the Administration of Justice Act 1960. But if all the parties want the hearing to be private, I can see no coherent reason why the default rule should not allow them to do so.

34. There are, on the other hand, some very bad reasons that have on occasion deterred the courts from sitting in private, and that is what I turn to next.

Tax planning: *MN v OP*²¹

35. In the most recent case on public hearings, *MN v OP*, the Court of Appeal declined to grant an

20. https://www.google.com/url?sa=t&rc=j&q=&esrc=s&source=web&cd=17&ved=2ahUKEwjt47XTp6ziAhUjVBUIHazWBpAQFjAQegQIBhAC&url=https%3A%2F%2Fwww.barcouncil.org.uk%2Fmedia%2F270848%2Fjan_8_2014_-_12_pt._rule_of_law_-_annual_international_rule_of_law_lecture.pdf&usg=AOvVaw26hvFeTAn1kFRvLmwKKZdC.

anonymity order in an application to vary a trust under the Variation of Trusts Act 1958. The parties to the variation application, all of whom wished the judgment to be anonymised, argued that the relevant considerations were no different from those applicable to applications for the court's approval of a compromise under CPR rule 21.10. It had previously been held (in *X v Dartford and Gravesham NHS Trust*²²) that anonymity was the norm in approval applications. In both types of application, all that the court was being asked to do was to supply consent on behalf of minors or protected parties who were legally incapable of giving such consent themselves.

36. The judge at first instance, however, considered that there were significant differences. The first of these differences (as summarised by the Court of Appeal) is revealing—

...the public interest in disclosure in this case went beyond the mere interest in the public knowing how the court's function under the 1958 Act is performed. This was because there was a legitimate public interest and considerable public debate at present about arrangements made by companies and individuals to obtain a fiscal advantage, even when there was nothing improper in those arrangements.

It is unclear whether or not the Court of Appeal endorsed this argument, but in substance it upheld the judge's decision. I would respectfully suggest that it is a thoroughly bad argument and should have been emphatically rejected.

37 It is true that the question of the legitimacy of tax planning is the subject of some current debate. It is also no doubt true that the public—or at least, its more vociferous element—wishes to know the names of those who engage in such practices. The purpose of obtaining this information can only be to enable those who disapprove of all tax planning, lawful or not, to “name and shame” anyone who takes steps to reduce

their tax liabilities. The words, “even when there was nothing improper in those arrangements” should send a chill down everyone's spine. Surely, it should be the function of the courts to *protect* the privacy of citizens who are doing nothing improper from the populist mob?

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38. In an important judgment by Kewley CJ in *In the Matter of the G Trusts*,²³ the former Chief Justice of Bermuda explained his reasons for granting an anonymity order as follows—

Bermuda's offshore sector began in the mid-1930's and the concept of offshore companies and offshore trusts were commercially driven, at least in part, by anxieties on the part of far-sighted members of the European moneyed classes about looming war and the risk of the confiscation of their assets (or worse) by populist governments envious of their wealth in recessionary times. The confiscation of assets and worse did in fact occur, and Bermuda fought on the victorious side which introduced the notion of fundamental human rights designed to ensure that untrammelled democracy would not trample on personal and property rights again.

39. As the Court of Appeal in *MN v OP* recognised, there are two competing human rights in play in applications for anonymity: the right of the individual to privacy under Article 8, and the right of the press and public to freedom of expression under Article 10. Giving the leading judgment, Sharp LJ acknowledged that, “It is true that information about people's personal financial position is usually regarded as a private matter.”²⁴ However, it appears that anyone wealthy enough to wish to invoke the

21. [2019] EWCA Civ 679.

22. [2015] 1 WLR 3647.

23. [2017] SC (Bda) 98 Civ (15 November 2017).

24. At ¶69.

court's jurisdiction under the 1958 Act is obliged—at least in England—to sacrifice his right to keep his financial affairs private as the price of asking the court to exercise the powers conferred on it by parliament.

40. It is not clear to me why the personal affairs of the rich should be invaded more readily than those of the rest of the world: the fact that the rich are the objects of populist envy ought to give the courts reason to afford them more protection, not less.

It is not clear to me why the personal affairs of the rich should be invaded more readily than those of the rest of the world: the fact that the rich are the objects of populist envy ought to give the courts reason to afford them more protection, not less

41. In addition to the hostility of the public in general, the wealthy are uniquely prone to a number of threats to which the courts should be sensitive when considering their requests for privacy. The very fact of their wealth makes them attractive targets to criminals; many of them feel the need to employ private security, because they (and their families) face real risks of kidnapping. At the same time, the rich are often understandably concerned that their children should grow up without having their outlook and values distorted by their privilege. They may wisely seek to shield them from knowledge of the full extent of their wealth, but such efforts are undermined if the details become a matter of public record.

Competition from offshore and arbitration

42. This brings me to another factor that should be considered in rejecting requests for anonymity. If

the English courts persist in their doctrinaire insistence on open justice in all but the most exceptional cases, those who can afford to will look elsewhere. Already there is competition amongst the offshore jurisdictions in terms of their readiness to sit in private; and there is growing interest in arbitration to deal with a wide range of trust issues. A few jurisdictions, notably the Bahamas²⁵ and Guernsey,²⁶ have already enacted legislation to make this possible, and we should not be surprised if others follow suit.

43. The consequences of such developments will surely be detrimental to English trusts law. The widespread use of arbitration, in particular, would be especially damaging, as the development of the law depends on precedent. In addition, if more and more disputes are dealt with through arbitration, the stated purpose of insisting on open hearings—that of ensuring that justice is seen to be done—will in practice have been defeated: for those who believe in the absolute value of open justice, this is surely a classic instance of the best being the enemy of the good.

44. Some types of dispute will remain incapable of being dealt with in arbitration. It is difficult to see, for example, how a trust could be varied—at least in a way that would bind HMRC—without the imprimatur of the court. However, in many such cases, the trustees have a power to change the governing law of the trust, and it is not uncommon to see such powers being exercised in order to take advantage of provisions that exist elsewhere. The ease with which the perpetuity period of a trust can be extended, or even eliminated, under Bermuda law has, for example, proved a popular selling-point. It is not difficult to imagine that a greater willingness to hear trust cases in private may give offshore jurisdictions an even greater advantage. In Nevis, for example, trust matters are automatically heard in camera,²⁷ and

25. Trustee (Amendment) Act 2011.

26. Trusts (Guernsey) Law 2007.

27. Section 57(2) of the Nevis Exempt Trust Ordinance provides that “All judicial proceedings, other than criminal proceedings relating to international trusts, shall be heard in camera and no details of the proceedings shall be published by any person without the leave of the Court”.

there are stringent provisions protecting the privacy of the parties.²⁸

Conclusion

45. It is unfortunate that the courts have treated the historically entrenched principle of allowing open access to the public as inseparable from the issues of reporting and anonymity. In a large number of cases—such as *MN v OP*—it is difficult to see any *legitimate* public interest in knowing the identities of the parties. The reasons given are either *non sequiturs*, or they represent a failure (to borrow again the words of Kewley CJ) “to ensure that untrammelled democracy [does] not trample on personal and property rights”.

It is unfortunate that the courts have treated the historically entrenched principle of allowing open access to the public as inseparable from the issues of reporting and anonymity

46. Given the weight of precedent, however, there is no prospect of the English courts reversing the current trend. The Human Rights Act has only made matters worse, with the Press’s right to freedom of expression trumping the individual’s right to privacy at almost every turn. Legislation would be needed, and the Press would campaign vigorously against it. In the meanwhile, there is an opportunity for the offshore jurisdictions to strengthen the protection they afford to that unpopular and vulnerable class, the very rich.

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28. The Confidential Relationships Act 1985 (as amended) imposes criminal sanctions on anyone who divulges confidential information to any person not entitled to it. This applies to every trust registered under the Nevis Exempt Trust Ordinance: section 57(1).